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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

No. 309.

WILLIAM N. BORAH, S. W. TROTTER, A. F. NISBET, TOLIVER SIMPSON, J. J. DAVIS, W. B. HEIDINGER, AND H. TOMPKINS, APPELLANTS,

vs.

JOSEPH E. WILSON, COUNTY CLERK AND O. P. PATTERSON, COUNTY COLLECTOR AND TREASURER OF WAYNE COUNTY, ET. AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT OF APPELLANTS.

H. TOMPKINS AND BELL & GREEN,
Attorneys for Appellants.

PRESS Print, Fairfield, Illinois.

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In submitting this case, that the Court may readily get at the issue involved, we will state that the facts and issue make it a paralel case with that of *Norton v. Shelby* ~~& Co.~~ County, decided by this Court and reported in 118 U. S. reports, page 425.

The cause was instituted by Wm. N. Borah, et. al., tax payers of Wayne County, Illinois, on behalf of themselves and all other tax payers, to enjoin the assess-

ment, levy and collection of taxes to pay $100,000 of bonds with interest, purporting to be the obligation of the County of Wayne, issued in payment for $100,000 of the capital stock of the Springfield and Southeastern R. R. Co.; $33,000 dated Sept. 19th 1869; $33,600 dated Nov. 19th, 1869, and $33,400 dated Jan. 15th, 1870. Also $100,000 dated May 5th, 1870, designated as donation bonds payable to said R. R. All of which bonds were made payable in 20 years.

The Complainants set up the acts of the Legislature of the State of Illinois, and the provision of the constitution by which the county affairs are to be conducted; also the special and local enactments, of the Legislature, under which the pretended obligations of the county were executed.

They then submit that all of the acts and doings of the parties acting under the special and local enactments, in the issuing of the bonds, was without power or authority to bind the tax payers and are null and void, as not being the act of the County of Wayne.

CONSTITUTIONAL PROVISION OF 1848.

Page 3, Article 7, Sec. 6, as follows: "The General Assembly shall provide by a *general law* for a township organization, under which any county may organize whenever a majority of the county at a general election shall so determine; and whenever any county shall adopt a township organization so much of this constitution as provides for the management of the fiscal concerns of the said county by the county court may be dipensed with, and the affairs of the county may be transacted in such

manner as the General Assembly shall determine.

GENERAL LAW ADOPTING TOWNSHIP ORGANIZATION.

(Session Laws Feb. 17th, 1851, Page 85.)

Sec. 1. That at any general election that may be holden in the several counties in this state, the qualified voters in any county may vote for or against township organization in any county in the state.

Sec. 2. The county court on petition of fifty legal voters of said county shall cause to be submitted to the voters of the county the question of township organization under this act. * * *

Sec. 4. If it shall appear by the returns of said election that a majority of the legal voters of said county are for township organization, then the county so voting in favor of its adoption shall be governed by and subject to the provisions of this act on and after the first Tuesday of April next succeeding.

Sec. 5. The county court shall at its next session appoint three commissioners * * to divide the county into towns or townships. * *

WAYNE COUNTY DID ORGANIZE.

That after the above provision had been complied with. That the county court did appoint commissioners, who proceeded to divide the county into fifteen towns, as shown by the following report:

March Term, 1860.

Report of Commissioners.

To the honorable county court of Wayne county, Ill.:

The undersigned, who were appointed at the last December term of said court, commissioned to lay off

said county of Wayne into townships preparatory to organizing said county under the township organization law, would respectfully report that they have laid off said county into towns, with names as follows, viz:

Arrington, Barnhill, Bedford, Big Mound, Brush Creek, Elm River, Four Mile, Hickory Hill, Indian Prairie, Jasper, Lamard, Leech, Massilon, Mount Erie, and Zif, with boundary as shown by "Ex. A."

That the County Court adopted the above report and the fiscal affairs of the county passed to the management of the Supervisors to be elected on the first Tuesday of April each year, one from each township, to be known as "The Board of Supervisors."

The complainants represent that the management of the fiscal concerns of the county, as adopted, has never been changed by any vote of the voters of Wayne county or by provision of any general law regulating township organization.

That the division of the county into fifteen towns, as made, reported, and adopted by the county court on the 1st day of March, 1860, has remained the same to this date.

Act 16, Sec. 1, Provides: That the supervisors of the several cities and towns of the counties of the State that shall adopt the town system under this act, shall meet annually in their respective counties for the dispatch of business as a Board of Supervisors.

Sec. 2, Provides for annual meetings 2d Monday in September each and every year.

Sec. 5. A majority of the supervisors of any county

shall constitute a quorum for the transaction of business.

Act 15, Sec. 2. No county under this organization shall possess or ~~govern~~ exercise any corporate powers except such as are enumerated in this act, or shall be specially given by law: or shall be necessary to the exercise of the powers so enumerated or given.

Art. 6, Sec. 15. *(Tenure of office.)* Town officers, except justices of the peace and constables, shall hold their offices for one year, and until a successor is chosen or appointed in their place and are qualified.

TO ABOLISH TOWNSHIP ORGANIZATION.

The following are the provisions for a change from township organization back to a county court, and is the only provision:

"Upon a petition of at least one-fifth of the legal voters of any county having adopted township organization, to be ascertained by the vote cast at the last preceding Presidential election, the county board shall cause to be submitted to the voters of such county at the next general election the question of continuance of township organization, to be voted on by ballot, written or printed, or partly written and partly printed, for the continuance of township organization or against the continuance of township organization; notice to be given and the votes to be canvassed and returns made in like manner as in this act provided in reference to a vote on the adoption of township organization.

AN ATTEMPTED CHANGE OF THE MANAGEMENT OF THE FISCAL AFFAIRS OF THE COUNTY BY SPECIAL ENACTMENT OF THE LEGISLATURE, ENTITLED

"*An act to change the term of electing certain officers in a county therein named.*" Approved Feb. 26th, 1867.

SEC. 1. *Be it enacted by the people of the State of Illinois, represented in General Assembly*, That the board of supervisors of Wayne county shall consist of five persons, to be elected in the following manner, to-wit: The townships of Four Mile, Hickory Hill, and Arrington shall constitute the first electoral district of said county, and shall be entitled to one member of said board. The townships of Big Mound, Lamard, Jasper, and Barnhill shall constitute the second electoral district of said county and be entitled to two members of said court [board]. The townships of Leech, Massilon, Mt. Erie, and Elm River shall constitute the third electoral district in said county and be entitled to one member of said board. The remainder of said Wayne county shall constitute the fourth electoral—, and shall be entitled to one member of said board.

SEC. 2. There shall be elected on the first Tuesday in April, one thousand eight hundred and sixty-seven, and every four years thereafter, in each of said electoral districts, one member of the board of supervisors of said Wayne county, who shall each hold their office for the term of four years, or until their successors are elected and qualified, except in the second district of said county, which shall elect two members of said board, as provided in section one of this act, who shall hold their office for the said term of four years, and until their successors are elected and qualified.

SEC. 3. Said board, so composed, shall, at their first

meeting, organize by electing one of their number chairman for the term of four years, who shall be allowed to vote upon all questions as other members of said board; and said board, when organized, shall do and perform all duties enjoined upon the board of supervisors, acting under the general township organization laws of this state, and shall have all the powers and privileges of boards of supervisors acting under such general township organization laws, and any three of said board shall constitute a quorum for the transaction of any business.

SEC. 4. The members of said board shall each receive such compensation *per diem*, as they may fix, not to exceed four dollars per day for each day in which said members shall be engaged in attending said court.

SEC. 7. All duties not herein provided for, to be done and performed by virtue of the township organiztion laws of this state by the supervisors of towns of the different towns shall be done and performed in said county by a justice of the peace in such town, who shall be selected by the town clerk, town assessor, and town collector for that purpose each year, as soon as practicable after the election of town officers in such towns; and said town clerk, assessor, and collector shall have power to fill the vacancy occasioned by death, resignation, or refusal to serve of said justice of the peace; and such justice of the peace so appointed shall hold such appointment for the term of one year and until his successor shall be appointed and his appointment shall be entered of record by the town clerk, and he shall receive the same compensation provided by law for the supervisor

for the like services; but nothing in this act shall be construed to change or in any manner affect the places or manner of voting, as now established by law, in the different precincts in said county.

SEC. 8. This act shall be deemed and taken as a public act and be in force from and after its passage.

RESPONDENTS' CLAIM OF POWER TO ISSUE THE BONDS.

That is, the bonds were issued by five persons claiming to act under the special act creating five districts of the special towns, with five supervisors to be the county government, and under the enactment incorporating the Illinois Southeastern R. R. Co., *approved* Feb. 25th, 1867. In which were the following provisions:

SEC. 7. That the county court or board of supervisors, where such county has adopted township organization, of any county into or through which their road or its branches may pass is hereby authorized and fully empowered to donate to said company, as a bonus or inducement toward building of said railroad or its branches, any sum not exceeding one hundred thousand dollars, and may order the clerk of the county court or board of supervisors of said county to issue bonds of the county to the amount donated, and such clerk of the court or board of supervisors, as the case may be, of such county shall countersign and deliver said bonds so issued to the president—directors of said R. R. Co., which said bonds may bear any rate of interest not to exceed ten per cent. per annum, payable at maturity of the * * * bonds, as hereinafter expressed, and yearly thereafter: Provided, That no donation of the county court or board of

supervisors of such county shall be of a greater sum than fifty thousand dollars until after the question of such larger donation shall have been submitted to the legal voters of such county at an election to be called, conducted, returns made, canvassed, and published in the usual manner of calling, conducting, making returns, canvassing, and publishing special county elections, at which election each voter shall vote a ticket upon which is written or printed the words, viz.: "For donation" or "Against donation;" and if a majority of the votes cast at such an election be in favor of donation it shall be the—county court or board of supervisors of such county so voting to donate some amount, not less than fifty thousand dollars nor more than one hundred thousand dollars, to said company, and to order the issuing of the bonds of the county, as hereinbefore provided, for the amount so donated, which bonds shall be made payable to the directors of said company and may be in any denomination not less than one hundred nor more than one thousand dollars each, at the discretion of the said county court so issuing the same.

Then by an amendatory act to the act of incorporation approved 24th Feb., 1869. "An act to amend an act entitled An act to incorporate the Illinois Southeastern Railroad Company;" which act, among other things, provided that the Illinois Southeastern R. R. Company, in addition to the powers already conferred, shall have such other powers, rights, privileges, and immunities as are herein provided for, and all subscriptions to the capital stock or donations or gifts to said railway company,

whether made by individuals, townships, counties, or corporations, shall be and are by this act legalized, and the said company is hereby empowered and authorized to collect and use the same upon the consideration as donated and subscribed. * * *

And the county courts or board of supervisors of said counties, respectively, may issue such bonds, payable to the directors of said company or bearer or otherwise, so as to make them negotiable by delivery, having such time to run and bearing such rate of interest, not exceeding ten per cent. per annum, payable annually or semi-annually, in or out of the State, as may be agreed upon by them and the said railroad company and conformable to the terms upon which donations were or may be, respectively, voted for in said counties; the interest to be payable to bearer according to interest coupons attached to said bonds. Said act further provides that whenever said railroad company shall so demand the county courts or board of supervisors, as the case may be, of said counties, respectively, and the proper authorities of the several townships shall cause the bonds so provided for, with interest coupons attached, to be prepared and executed and placed in the hands of a trustee to be agreed upon by the said county court or board of supervisors, who shall deliver said bonds to said railroad company or its assigns when and as the condition upon which said donations were voted for shall be fulfilled, and the coupons for all interest past due at the time when said company becomes entitled to the said bonds shall be detached and canceled by said trustee and the interest for the current half year

or year so arranged that said counties shall only pay interest on said bonds from the date at which said railroad company was entitled to receive the same. * * *

NOTICE.

The foregoing statement becomes notice of the provisions of the constitution of the State of Illinois of 1848. Art. 7, Sec. 6, providing for the management of the fiscal affairs by a county court: by three judges; or by a board of supervisors under township organization, and the act of incorporation of the Springfield and Illinois Southeastern R.R.Co., becomes, also notice. Referring in every instance, that the power and discretion of binding or obligating ~~to~~ the County of Wayne in the matter of donation or subscription to the capital stock was alone left to the legally organized bodies.

PROCEEDINGS TO ISSUE THE BONDS. (Page 78.)

Called Session, January, A. D. 1868.

STATE OF ILLINOIS, } ss.
Wayne County, }

Board of Supervisors, Call Session. January Term, A. D., 1868.

On Saturday, the 18th day of January, A. D., 1868, being the 18th day January, 1868.

Present: Daniel Wingate, chairman; Oliver Holmes, clerk; Daniel Haines, sheriff; Levi M. Cisne, Miles Harris, Jacob B. Borah, and Copeland McKelvy.

Be it remembered that on Saturday, the 18th day of January, 1868, the same being as yet one of the days of the aforesaid meeting of said board of supervisors, the following, among other proceedings, was [were] had and

entered of record by said board in words and figures following, to-wit: On motion, it is ordered that the notice filed in the clerk's office by Miles Harris and Jacob B. Borah for a call meeting of the aforesaid board be entered of record, and is as follows, and was filed in the clerk's office January 13th, 1868:

To Daniel Wingate, Levi Cisne, and Copeland McKelvy, Supervisors of Wayne county, Illinois.

GENTLEMEN: There will be a special meeting of the board of supervisors of Wayne county, Illinois, convened at Fairfield, in said county, on Saturday, the 18th day of January, A. D., 1868, for the purpose of ordering an election for submitting to the people of Wayne county the question of donating and subscribing county bonds to and in consideration of a railroad through Wayne county, and such other purposes and business as said court may see proper to transact.

Witness our hands and seals this 13th day of Jan. A. D., 1868.

JACOB B. BORAH, [SEAL.]
MILES H. HARRIS, [SEAL.]
Supervisors of Wayne County, Illinois.

On motion of Levi M. Cisne, it is ordered by the board of supervisors of Wayne county, in the State of Illinois, that a special election shall be held in the usual places of voting in the said County of Wayne, on the 25th day of February, A. D., 1868, upon the following propositions, to-wit:

1st. That the County of Wayne subscribe the sum of one hundred thousand dollars to the capital stock of the

Illinois Southeastern Railway Company. * * *

And be it further ordered by the board of supervisors of said Wayne county, in the State of Illinois, that at the special election heretofore ordered to be held at the usual place of voting, in the said county, on the 25th day of February, A. D., 1868, the following additional propositions shall be voted upon as an inducement or bonus towards building the Illinois Southeastern Railway:

1st. That the County of Wayne, in the State of Illinois, shall donate the sum of one hundred thousand dollars to the Illinois Southeastern Railway Company.

By stipulation of parties hereto, *page* 81 and 82, it is admitted that no election was held by the voters of Wayne county directly on the question of adopting the provisions of the "*Act to change the time of electing certain officers in a county therein named.*" *Approved* Feb. 25th, 1867. But an election was had May 18th, 1867.

PROOF OF RECORD OF AN ELECTION.

Ex. I, page 74 to 78, it is shown by proof that the only election had or pretendsd to have been had under the act to elect "*district supervisors*" was had in only nine towns of the fifteen towns of the county on the 18th of May, 1867. No election was had in the other six towns. That there is no record of any election held in what was designated as the 3d district, embracing the towns of Leech, Massilon, Mt. Erie and Elm River. Besides, there is no record of any change of the county government from the fifteen supervisors to that of *district supervisors*. See Wilson's evidence, page 88.

By a general expression and demand of the people

in opposition to the usurpation of the *fiscal affairs* of the county by the said five persons, designated *district supervisors*, the Legislature did on the 12th of April, 1871, repeal said act, by an act entitled "that the act reducing township organization into *one act* be *re-enacted*."

ON THIS RECORD WE SUBMIT.

1. There was no competent court to exercise the discretionary power of submitting any proposition to a vote under the act incorporating the Illinois Southeastern Railway Company or at any general law.

2. That the act of Feb. 25, 1867, entitled "An act to change the time of electing certain officers in a county therein named," was unconstitutional and in violation of the provisions of the constitution of 1848, article 7, section 6, as follows:

"The General Assembly shall provide by a general law for a township organization, under which any county may organize whenever a majority of the voters of such county at any general election shall so determine; and whenever any county adopts a township organization so much of this constitution as provides for the management of the fiscal concerns of the said county by the county court may be dispensed with, and the affairs of said county may be transacted in such manner as the General Assembly may provide;" and, in violation of article 3, section 23, says: "No private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title."

And, in violation of article 9, section 5, says: "The

corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes."

3. That the title of the act did not express the subject-matter, and that the act did embrace more than one subject and was a local act, affecting Wayne county alone.

4. That it was an attempt of the Legislature to create an office unknown to the Constitution. 1st. J. J. Marsh, 206, *Hildreth* v. *McIntire*.

5. That the amendatory act entitled *An act to amend an act entitled an act to incorporate Illinois Southeastern R. R. Co.*, approved Feb. 24, 1869, is in violation of section 23, Art. 3, of the Constitution of 1848, (so far as it attempts to legalize the acts of the body of district supervisors, or board of supervisors in their action of submitting the question of subscribing to the capital stock of said R. R. Co., or, of making a donation thereto; or, of providing for their registration under an act relating to county debts, approved Feb 13, 1865) which declares "that no private or local law shall embrace more than one subject matter, which shall be expressed in its title." *Welsh* v. *Post*, 99 Ill., 471.

6. That all parties purchasing the bonds, had full notice of their invalidity. See copy bond for *donation*, page 57. Copy bond for subscription for stock, page 66, by their recitals.

Donation Bond.

No. 67. $1,000.
UNITED STATES OF AMERICA.
State of [Vignette.] Illinois.
Wayne County Railroad Bond.
Registered by the auditor of public accounts of the State of Illinois. Principal and interest collected and paid by the treasurer of the State of Illinois.

Know all men by these presents that the County of Wayne and State of Illinois acknowledges itself to owe and be indebted to the Illinois Southeastern Railroad Company or bearer in the sum of one thousand dollars, which sum the said County of Wayne promises to pay, at the American Exchange National Bank, in the City of New York, on the 1st day of January, A. D., 1890, the said county reserving the right to pay this bond at any time after ten years from the date of its issue, with interest at the rate of 7% (per cent.), payable semi-annually, on the 1st days of July and January of each year, on the presentation and surrender of the annexed coupons.

This bond is one of a series of bonds issued by Wayne county to aid in the construction of the Illinois Southeastern Railway in pursuance of the authority conferred by an act of the General Assembly of the State of Illinois entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and of an election of the legal voters of Wayne county, Illinois, held on the 25th day of February, 1868, under the provisions of said act.

This bond is not to become a binding obligation on the said County of Wayne until the fol-

Stock Bond.

No. 92. $500.
UNITED STATES OF AMERICA,
State of Illinois.
Wayne County Railroad Bond.
Registered by auditor of public accounts of the State of Illinois. Principal and interest collected and paid by the treasurer State of Illinois.

Know all men by these presents that the County of Wayne, State of Illinois, acknowledges itself to owe and be indebted to the "Illinois Southeastern Railway Company" or bearer in the sum of five hundred dollars, which sum the County of Wayne promises to pay, at the American Exchange National Bank, in the city of New York, on the 1st day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually, on the first days of January and July of each year, on the presentation and surrender of the annexed coupons, this bond being issued, under and pursuant to orders of the county court of Wayne county, Illinois, for subscription to the capital stock of the Illinois Southeastern Railway Company, as authorized by virtue of the laws of the State of Illinois; and the faith of the County of Wayne is hereby irrevocably pledged for the payment of said principal and interest as aforesaid.

In witness whereof the said County of Wayne has executed this bond by causing the chairman of its board of supervisors to subscribe his name hereto, and to be countersigned by the clerk of this court *and* affixing the seal of said court; all of which is done at Fairfield, Illinois, by and under the order of

lowing conditions is [are] complied with, to-wit, that said company shall have completed or cause to be completed the whole line of said road within the limits of Wayne county, and the cars — be running upon the same; and for the payment of said sum of money and the interest accruing thereon, in the manner aforesaid, upon the performance of said condition, the faith of the County of Wayne is hereby irrevocably pledged.

In testimony whereof the said County of Wayne has executed this bond by causing the chairman of the board of supervisors to subscribe his name hereunto, and to be countersigned by the clerk of this court *and* affixing the seal of said court: all of which is done by and under orders of the board of supervisors of Wayne county, at Fairfield, this 6th day of May, A. D., 1870.

DANIEL WINGATE,
Chairman of Board of Supervisors.

Countersigned by—
[Seal Wayne Co. Court, Ill.]
OLIVER HOLMES,
Clerk of County Court.

the board of supervisors of Wayne county, this the nineteenth day of November, A. D. 1869.

DANIEL WINGATE,
Chairman of Board of Supervisors.

Countersigned by—
OLIVER HOLMES,
[SEAL] *Clerk of County Court.*

ARGUMENT.

From these facts, that the act, entitled an "*Act to change the time of electing certain officers in a county therein named,*" being unconstitutional, and the amendatory act to the act incorporating the Illinois Southeastern R. R., having been declared unconstitutional in case Post v. Walsh, 99 Ill., 471, it is apparent that there was no power to bind the county in the issue of either series of bonds.

But it is insisted that the five *district supervisors* were *de facto* officers of the *county court* or *board of su-*

pervisors. Then the question: Was such a "body" a *de jure* "office" of the board of supervisors under township organization with fifteen towns and fifteen supervisors organized under the general law, and, could have the five persons so acting be a *de jure body*.

The enactment, instead of changing the time of electing certain officers, provided for the overthrow of the county government as established under the Constitution, Act 7th, Sec. 6, 1848, and the general law thereunder. The enactment recites and names the fifteen towns as having been organized, and sets out how they were to be consolidated, and how many persons should be elected from each district so consolidated to make the five persons who should take the place of the fifteen supervisors and constitute the "board" of supervisors of Wayne county. The first section attempts to destroy the constitutional office of the "board of supervisors" and to create a body unknown to the constitution for the county government. The enactment attempting to create an office unknown and forbidden by the Constitution, being void, no office or *de jure* body is created.

The facts in the case at bar, being a parallel case to that of *Norton v. Shelby County*, 118th U. S., 425, and the cases therein cited, we will refer the court not only to the full case as reported, but will call especial attention on this point, to the case quoted approvingly of Hildreth v. McIntire, 1st J. J. Marsh, 206: "The facts in that case; being, that the Constitution provided for the establishment of the Court of Appeals, the Legislature in lieu thereof attempted to abolish and create a new one. In reviewing

the status of its acts, the court said "although they assumed the functions of judges and clerks and attempted to act as such, their acts were *totally* null and void, unless they had been regularly appointed under and according to the constitution defining the duties and qualification and mode of appointment."

They say "There can be but one court, and that *de jure*. There can be no *de facto* officer without a *de jure* court."

This court again on page 442, Norton v. Shelby County, *supra*, asserts: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, *it creates no office*—it is, in legal contemplation, as inoperative as though it had never been passed."

In the case at bar the five persons acting as *district supervisors*, claiming authority to act, under an unconstitutional enactment, their acts can have no protection. And when respondents concede the unconstitutionality of the enactment the position of their being *de facto* officers is untenable.

What the office of a "county court" or "board of supervisors" is created for, by what authority and how, is not left in doubt, as the Constitution of 1848, Art. 7, Sec. 6, has clearly provided:

SEC. 6. "The General Assembly shall provide, by general law, for township organization under which any county may organize whenever a majority of the voters of such county, at any general election shall so determine, and whenever any county shall adopt a township organi-

zation so much of this Constitution, as provides for the management of the fiscal concerns by the *county court*, may be dispensed with and the affairs of said county may be transacted in such manner as the General Assembly may provide."

The People v. Garner, 47 Ill., see pages 249-251.

The Court says: "The constitution provides for county government, in either of two modes. Sec. 19, Art. 5, provides that the County Judge and two associates shall hold terms for the transaction of county business.

2nd, under Sec. 6, Art. 7, by complying with its provisions the county government is transferred to that of township organization. 'A Board of Supervisors by a general law.'"

County of Jasper v. Bellew, 103d U. S., 745.

The above decisions define the power, in a long series of cases, given to the Legislature through which the fiscal affairs of the County are to be performed.

By the vote of the people in 1860, under the general law to organize under Township Organization for the government of the county affairs, it was fixed that the "board" should consist of fifteen townships with fifteen Supervisors to constitute the "County Court," a *de jure* "Body." The Statute goes further and defines a quorum. Revised Statute, Chap. 34, Sec. 55: "A majority of the Supervisors of any County shall constitute a quorum for the transaction of business," and all questions which shall arise at meetings shall be determined by the votes of the majority present, except in cases as is therein provided.

In view of the provisions of the Constitution, the Leg-

islature is powerless to provide any other "office" or "board" for the transaction of the business of the County, except by general law.

If the Legislature had the power to consolidate fifteen towns as organized into township organization in Wayne County into four districts, and elect one from each of three and two from the fourth and clothe them with the power of being the "Board" of Supervisors of fifteen towns, they could consolidate all of the towns into one, and direct that there should be only one person elected to be called the "Board of Supervisors"; and, he to be the quorum and the chairman thereof. Beyond this, reasoning is lost.

When the Legislature breaks away from the restraint and power given by the Constitution to create another and distinct mode; or, manner of creating a court; or body, its acts are void and the court or board thus attempted to be created has no existence and furnishes no *de jure* office for a *de facto* officer; or, body of officers.

With these facts we place ourselves on the record as having shown that the act was not only unconstitutional, by its title, but was an attempt to create an "office" unknown to the Constitution.

An unconstitutional act changing the composition of the court or body which forms the court or body, (the office), is distinct from an unconstitutional act appointing or filling a known office.

We beg to refer the Court for authorities to sustain our reasoning, and view to the case of Norton v. Shelby County, 118 U. S., pp 441 to 449, and the cases therein

cited and commented upon.

The distinction between an unconstitutional act creating an office, and one to fill an office, is fully treated and becomes a fixed guide, as being the law.

The case of Norton v. Shelby Co. by the facts, as well as that of Hildreath v. McIntyre is directly in point, with the case at bar. It is shown, that there can be no *de facto* officer or body without a *de jure* office.

NO POWER DELEGATED.

No power was delegated or given to the five persons, called District Supervisors, to obligate the County in any manner to aid any railroad, either by the original or amendatory act incorporating the Illinois Southern Railroad Company.

The act to change the County Government from Fifteen Supervisors to that of Five District Supervisors was approved Feb. 25, 1867. While the act incorporating the Railroad Company was approved Feb. 27 1867, and the amendatory act approved Feb. 21, 1869. Yet, not one word is said of delegating to the so-called five District Supervisors the discretion; or, power, to subscribe to aid a railroad.

Besides the amendatory act only attempted to ratify acts of towns and cities. Sec. 10 of the amendatory act authorizes subscription to stock or donation, but required *a vote to be had after its passage* in 1869, and provided for Counties under Township Organization alone to use the discretionary power of subscribing for donation or stock, based on a vote *thereafter* to be had on petition of 25 legal voters. Nothing of this was done. See Norton

v. Shelby County on this point, p. 450.

NOTICE.

If the Legislature intended to empower the five persons, acting as District Supervisors, to issue the bonds of the county it would have been an easy matter to have said so in the amendatory act of 1869. But in every instance the language is to the "County Court" or "Board of Supervisors under Township Organization;" and then they were only authorized to act after a petition of twenty-five legal voters petitioned that the County Court or Board of Supervisors under Township Organization, should subscribe to the stock or donation, setting forth the amount and condition which was to be determined, by a vote of the people.

There is no pretense *that this was done*, but on the contrary the bonds recite that $100,000 was issued "*as a donatiion, pursuant to the vote had Feb. 25. 1868, under the charter and amendatory act* incorporating the Illinois Southeastern Railroad Company," while the other $100,000 for the stock, recite that they were issued by order of the "County Court" "as authorized by the laws of the State."

No vote was had except at an election which was called on petition, of two of the persons called District Supervisors, that a special meeting of the five persons should be held on the 18th of January, 1868, at which time the said five persons submitted the question of voting on the above propositions at an election to be held on Feb, 1868. *See pages 74 and 86, record 78.*

The Legislature, in the amendatory act of February,

1869, made no attempt to legalize this vote or the action of the five persons. See section 10 amendatory act incorporating the Illinois Southeastern Railroad Company. Session law, 1869, page 308, Vol. 3.

The recitals of the authority and power as set out in the bonds disclose that the "body" who issued them was not the "county court" nor "board of supervisors under township organization," and could not be a *de jure* "office," or court; nor, *de facto* officers of a *de jure* court; nor, of a constitutional organized court. Hildreth v. McIntire, *supra*.

The bonds have their base of power alone upon the one action of the five persons designated "district supervisors," Ex. 5, page 78. The record shows in calling of the election only five persons were acting; or, were present. Page 82, Ex. 6, shows the same with the two different recitals, in the respective bonds to be issued.

In this, we claim that respondents had full notice of the invalidity of the obligations they were purchasing. This court has said that the purchaser must know at his peril that the official who executes the obligation possesses the official character, and that he is empowered to execute, by lawful authority, the obligation.

There could not exist two county "Boards of Supervisors." ~~Statute~~ Article 7, Sec. 6, of the "General Law Adopting Township Organization," provided that "the Supervisor elected in each town should hold his office until his successor was chosen, or, appointed and was qualified."

See J. Wilson's, County Clerk's, evidence page 88. Answering from the record of the Board of Supervisors,

it appears that fifteen Supervisors constituted the board until the June term, 1867, when five persons appeared and acted as the Board. That the record shows no order, nor by what authority the change was made for the government of the County affairs, nor, that there was any change. Five persons could not be a quorum of fifteen, neither could two persons or supervisors petition or call a special meeting. The provision of the general law requires that five supervisors may by their petition call a special meeting by notifying all members. The respondents had full and complete notice of the law by the record, and recital in the bonds under which the bonds were issued, and of the character of the officers who signed them.

In conclusion we submit that the bonds are null and void, being issued by a "Body" created under an unconstitutional act with its power under an unconstitutional act; that, the "Body," the "Court," resting on the act, both must fall.

With this presentment to the Court we submit that the decree of the Circuit Court should be reversed, cause remanded with directions that a decree be entered granting the prayer of Complainants and that the injunction be made perpetual.

All of which is respectfully submitted.

H. Tompkins, and Bell & Green,
Attorneys for Appellants.

Office Supreme Court U. S.
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JAMES. H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

No. 309.

WILLIAM N. BORAH, S. W. TROTTER, A. F. NISBET, TOLIVER SIMPSON, J. J. DAVIS, W. B. HEIDINGER, AND H. TOMPKINS, APPELLANTS,

vs.

JOSEPH E. WILSON, COUNTY CLERK, AND O. P. PATTERSON, COUNTY COLLECTOR AND TREASURER OF WAYNE COUNTY, ET. AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF OF APPELLANTS.

H. TOMPKINS AND BELL & GREEN,
Attorneys for Appellants.

Goudy's PRESS Print, Fairfield, Illinois

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF OF APPELLANTS.

The appellants in reply to the position taken by appellees in their brief and argument in this case, with the facts and law that must govern the decision of this Court, would say that we deem it important to reply only to the issue made of authority to execute or issue the bonds.

Referring the Court first to the act under and by virtue of which the authority and power to issue the bonds in question must rest for their validity (hereto-

fore stated in our former brief) as follows:

"*An act to change the term of electing certain officers in a county therein named.*" Approved Feb. 28th, 1867.

SEC. 1. *Be it enacted by the People of the State of Illinois, represented in General Assembly*, That the board of supervisors of Wayne county shall consist of five persons, to be elected in the following manner, to-wit: The townships of Four Mile, Hickory Hill and Arrington shall constitute the first electoral district of said county, and shall be entitled to one member of said board. The townships of Big Mound, LaMard, Jasper and Barnhill shall constitute the second electoral district of said county and be entitled to two members of said court [board]. The townships of Leech, Massilon, Mt. Erie and Elm River shall constitute the third electoral district in said county and be entitled to one member of said board. The remainder of said Wayne county shall constitute the fourth electoral—, and shall be entitled to one member of said board.

SEC. 2. There shall be elected on the first Tuesday in April, one thousand eight hundred and sixty-seven, and every four years thereafter, in each of said electoral districts, one member of the board of supervisors of said Wayne county, who shall each hold their office for the term of four years, or until their successors are elected and qualified, except in the second district of said county, which shall elect two members of said board, as provided in section one of this act, who shall hold their office for the said term of four years, and until their successors are elected and qualified.

SEC. 3. Said board, so composed, shall, at their first meeting, organize by electing one of their number chairman for the term of four years, who shall be allowed to vote upon all questions as other members of said board; and said board, when organized, shall do and perform all duties enjoined upon the board of supervisors, acting under the general township organization laws of this state, and shall have all the powers and privileges of boards of supervisors acting under such general township organization laws, and any three of said board shall constitute a quorum for the transaction of any business.

SEC. 4. The members of said board shall each receive such compensation *per diem*, as they may fix, not to exceed four dollars per day for each day in which said members shall be engaged in attending said court.

SEC. 7. All duties not herein provided for, to be done and performed by virtue of the township organization laws of this state by the supervisors of towns of the different towns shall be done and performed in said county by a justice of the peace in such towns, who shall be selected by the town clerk, town assessor and town collector for that purpose each year, as soon as practicable after the election of town officers in such towns; and said town clerk, assessor and collector shall have power to fill the vacancy occasioned by death, resignation, or refusal to serve of said justice of the peace; and such justice of the peace so appointed shall hold such appointment for the term of one year and until his successor shall be appointed and his appointment shall be entered of record by the town clerk, and he shall receive the

same compensation provided by law for the supervisor for like services; but nothing in this act shall be construed to change or in any manner affect the places or manner of voting as now established by law in the different precincts in said county.

Appellees rely on this act as giving the power and authority to the "District Supervisors" to issue the bonds in question, as well as giving the official character to the body to bind the county to the obligation by lawful authority.

While appellees assert that by a long line of decisions of the Supreme Court of Illinois, such legislation has been declared unconstitutional and void.

1st. That it is in violation of the constitutional provision of the constitution of 1848, Sec. 6, Art. 7, which provides that the General Assembly shall provide by a *general law* for township organization, under which any county may organize whenever a majority of the voters of such county at any general election shall determine.

* * * * * * * * *

This section has received the construction of the Supreme Court of the state in case of People v Brown, 11 Ill., 478, the Court say: "The legislature does not possess the power to provide any other mode of township organization than under and by the 6th Sec. of Art. 7 of the constitution."

This was an early case and the decision has been affirmed as a rule of law and is affirmed in case of People v Brayton, 94 Ill., 341, the Court say: "Township organization expressly provides that county boards, in counties

which have adopted township organization, shall not have power to consolidate several towns into one, except upon the petition to the board of one-fourth of the voters in each of said towns, and that a majority of the voters in each town voting shall have voted in favor of the proposition."

2d. That it violates the 5th section of the 9th article of the constitution of 1848, which provides "that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for *corporate purposes*."

Cornell v People, 107 Ill., 372, the Court says: The clause in the Constitution of 1848 that the incorporated cities, etc., may be vested with power to assess and collect tax for corporation purposes, * * * and a similar clause in the present constitution is held a limitation upon the power of the legislature to confer the right, * * * upon any other person than the corporate or local authorities of the municipality or district to be taxed."

3d. It is in violation of Sec. 23, Art. 3, of the constitution of 1848, "That no private or local law which may be passed by the General Assembly shall embrace more than one subject matter, and that shall be expressed in the title."

This section of the constitution has received the construction of the Supreme Court of the state, which places the above enactment as being without authority and in violation of the constitution.

People v Mellen, 32 Ill., 181.

People v Inst. of Protestant Deaconesses, 71 Ill., 229.

Village of Lockport v Gaylord, 61 Ill., 276, the Court says: *An unconstitutional act cannot be ratified.*

Middleport v Ætna Ins. Co., 82 Ill., 562.

Welsh v Post, 99 Ill., 471.

Leach v Patterson, 120 Ill., 420.

From these authorities it is clear that there are but two modes provided by the constitution of 1848, by which the legislature can provide for the management of the fiscal affairs of a county. It is either by three judges to be elected by vote of the people or by a supervisor to be elected from each town under township organization.

Hence, it is insisted by Appellants that the "*District Supervisor*" is a new officer. That it is made so by an unconstitutional enactment of itself, and enacts and creates an uncontitutional *officer*. In the case of Leach v Patterson, *supra*, this question was brought before the Court, in which this Court will find much that points to the issue, in the case at bar. The Court in that case unanimously declare, the above act unconstitutional, together with the amendatory act amending the act to incorporate the Ill. Southeastern R. R. Co. While on the question of what constituted a *de facto* officer and whether the "District Supervisor" under the above act were such the Court was divided. Calling the Court's attention to the full decision, we quote from Justice Magruder, Scholfield and Mulkey's dissenting opinion, which we submit is the law, as laid down by this Court, as a rule of general law respecting de facto officers, and is in harmony with Norton v Shelby Co., *supra*, making the distinction so often over-

looked by misleading authorities, and must be taken as a declaration of *general* law, of what is a *de facto* officer.

We quote from Justice Magruder, Scholfield and Mulkey on this point, as it is fully in accord with our position. After reciting the above act, "*An act to change the the time of electing certain officers of a certain county therein named*," approved Feb. 28, 1867, on pape 437, 122 Ill., *supra*, they say:

"It is clearly unconstitutional upon the third ground, urged against it. It violates section 23 of article 3, as above quoted. It is a local law. It applies to Wayne county and no other county in the state. It embraces a subject, which is not expressed in its title. It is entitled "An act to change the time of electing certain officers in a county therein named." It does not change the time of electing any officers. It abolishes the office of supervisor of the town, and provides that the duties of town supervisors shall be performed by justices of the peace. It creates certain new electoral districts, and provides for the election of members of the board of supervisors, as such. No such official, as a member of the board of supervisors, had theretofore been elected, as such, by the people. Each town supervisor, when meeting with the supervisors of all the other towns in the county, was called a member of the board of supervisors. The five members of the new board were to be elected once in four years, instead of being elected annually. They were, however, new officials, created for the first time by this act. They were not town supervisors, but district supervisors. It is apparent from the most superficial examina-

tion, that the title furnishes no information of the subjects, which are embraced in the body of the law. The view, here expressed, is sustained by the following cases: *People* v *Mellen*, 32 Ill., 181; *People* v *Institution of Protestant Deaconesses*, 71 id. 229; *Village of Lockport* v *Gaylord*, 61 id. 276; *Middleport* v *Ætna Life Ins. Co.*, 82 id. 562; *Welch* v *Post*, 99 id. 471.

It is, however, urged, that the five district supervisors, who issued the bonds in question, were officers *de facto*, and that their acts, as such *de facto* officers, are valid and binding, so far as the rights of third persons are concerned. I do not think, that this position is tenable under the facts of this case. There are some authorities, which hold, that an act of the legislature, even if it be unconstitutional, is sufficient to give color of title, and that an officer, acting under it, is an officer *de facto*. But the cases, which lay down this doctrine, will be found, upon a careful analysis, to refer not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act, by which the officer is appointed to an office legally existing. Such cases apply only to the invalidity, irregularity or unconstitutionality of the mode, by which a party is appointed or elected to a legally existing office. Where an office has been *lawfully created*, the acts of an incumbent, who holds it improperly, will be considered valid, as being the acts of an officer *de facto*. But there can be no officer *de facto*, where no officer *de jure* is provided for. Before one can claim to be a *de facto* officer of the law, there must be a law creating the office. The office itself must be one *de*

jure; the officer may, then, be one *de facto*. There can be no officer either *de jure* or *de facto*, if there be no office to fill. (*Norton* v *Shelby County*, 118 U. S. 425; *Town of Deborah* v *Bullis*, 25 Iowa, 12; Wait's Actions and Defences, Sec. 9). Dillon in his work on Municipal Corporations (3d ed.) Sec. 276, says: "The notion, that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and, therefore, a person cannot claim to be a *de facto* officer of a municipal corporation, when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer."

It cannot be said of the act of February 28, 1867, that it merely prescribed a new mode of selecting the members of the board of supervisors of Wayne county. It endeavored to form a new board of supervisors, unknown to the township law, under which Wayne county was organized, and opposed to the spirit and theory of that law. In the place of a board, consisting of fifteen town officers, elected by the fifteen towns of the county, eight of whom constituted a legal quorum, it provided for the organization of a board of five men, elected by five newly created electoral districts, and three of whom constituted a legal quorum. It is apparent from the observations already made, that this act sought to inaugurate a new system of government for Wayne county. It made provision for a set of officials, who, though they were called by the same name as the old board, were yet, in fact, an entirely new governing body.

It follows, that the five men, who issued the bonds

under consideration, were not incumbents of offices, already legally existing, and cannot be regarded as *de facto* officers. As the act, which attempted to create the board of five district supervisors, never became a law, that board never really came into existence. The Supreme Court of the United States say: 'An unconstitutional act is not a law; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed.' *Norton* v *Shelby County*, *supra*.

It is further claimed, that the issuance of the bonds, involved in this suit, has been ratified by the legislature in the passage of an act, approved February 24, 1869, and entitled, 'An act to amend an act entitled an act to incorporate the Illinois Southeastern Railway Company.' (3 Private Laws, p. 308.) The first section of this act provides, that 'all subscriptions to the capital stock, or donations, or gifts to said railway company, whether made by individuals, townships, counties or corporations, shall be and are by this act legalized; and the said company is hereby empowered and authorized to collect and use the same upon the conditions as donated and subscribed.'

Clearly this first section of the act of 1869 is unconstitutional, as being in violation of section 23 of article 3 of the constitution of 1848, as above quoted. This court said of it in *Welch* v *Post*, *supra*: 'The question is directly made, that the amendatory act of 1869 violates the constitution of 1848, article 3, section 23. * * * On the authority of *Middleport* v *Ætna Life Ins. Co.*, 82 Ill., 562, we are inclined to hold the point is well taken, and,

if so, it would be conclusive of the whole case.' In *Village of Lockport* v *Gaylord*, *supra*, the act under consideration was an act of the legislature, entitled 'An act to amend the charter of the Village of Lockport, passed February 12, A. D. 1853,' the 6th section of which was as follows: 'That the appropriations made by the president and board of trustees, and orders, drawn by the clerk in February, 1867, be, and the same are, hereby fully legalized in all respects.' It was there said: 'The legalization of unauthorized acts of the corporation can not be considered to be amendatory of its charter * * * The object of the 6th section is not expressed in the title of the act, and we must hold, that it was passed in violation of the constitution, and is, therefore, void.'

There is no difference between the act, which came under review in *Village of Lockport* v *Gaylord*, and the act of 1869, now under consideration. The latter act, in its title, purports to amend the charter of the Illinois Southeastern Railway Company. The first section attempts to legalize unauthorized donations and subscriptions. Such legalization is not amendatory of the charter. The object of the first section is not, therefore, expressed in the title of the act. Hence, it must be held to have been passed in violation of the constitution, and is void. Being thus unconstitutional and void, it cannot be regarded as a ratification of the illegal acts of the board of supervisors, created by the act of February 28, 1867.

For the reasons here stated I think the judgement of the county court should be reversed."

Mr. Justice Scholfield: "I concur in the forego-

ing views of Mr. Justice Magruder."

MR. JUSTICE MULKEY: "I fully concur in the dissenting opinion of Mr. Justice Magruder."

It is difficult to go any further in reasoning as to the power and authority of the five persons styled "District Supervisors" to execute and obligate the County of Wayne for the payment of the bonds, when it is conceded that the act providing for the office is unconstitutional and void, as well as the creating of the office of a "District Supervisor."

The majority of the Court in their decision, after conceeding the unconstitutionality of the act creating the office of district supervisor, fall into the error that the board may consist of any number that the legislature may see fit to determine, by special legislation for each county. Thus overruling the decision in effect formerly had in *People* v *Brown*, 11 Ill., *supra*, and cases thereafter approving the *same*. That is, "there can be but *two modes* for *county government*." And if, acknowledged and followed would be confusion worse confounded for the government of the fiscal affairs of a county, and such as was never contemplated, in the adoption of the constitution.

The position thus taken should have no controlling force in this case, when it is admitted that the enactment so changing the county government was null and void, and so held by the full Court. It then remains to determine, will this Court stand by its decision in *Norton* v *Shelby County*, *supra*, as the *declaration of a rule of general law* that must determine who is a *de facto* officer. We can see no distinctive feature in the case of *Norton* v

Shelby County and the case at bar, except, in the first, the legislature endeavored to empower the commissioners court of five persons by direct enactment to issue the bonds the same as the court of quarterly sessions, composed of justices of the peace, might do. *See bottom of page* 427.

Appellees refer to the case of Harter v Kernochan, 103 U. S., 507. That was an action against a town where the county nor township government had been disturbed, and where a vote was had of the legal voters after a special town meeting was called to determine the question.

The question in that case did not involve the question now submitted to the Court.

The same with the case Bohnam v Needles, 103 U. S., 648.

We see no position taken by the Appellees nor authorities cited that militates against Appellants' position.

1st. That under the constitution of 1848 there was no power vested in the legislature of the state to create the office of "District Supervisor."

2d. There was no power vested in the five persons called district supervisors to call the election to vote for or against the issue of the bonds nor to issue the same. In every instance the power and authority was to the supervisors under township organization.

3d. There was no election under the act as required by its provision on the first Tuesday in April. The only election as appears of record, or returns, was had in nine of the fifteen townships to elect the "district supervisors"

was had May 18, 1867. See page 74 to 77.

Exhibit "I".

	1st dist.			2d dist										4th dist			
	D. Wingate.	John Keen, Jr.	R. T. Forth	M. H. Harris.	Titus Billington.	J. B. Borah.	D. N. Ulm.	Jeff Sloan.	A. Rinard.	L. T. Moore.	I. C Bestom.	Tom Smith	Wm. McClure.	M. Book.	L. M. Cisne.	William Mix.	W. H. Mix
Four Mile	27	43															
Arrington	20		44														
Big Mound				73	34	38	1	1									
LaMard				13	9	52	33		5	3	3						
Barnhill				110	114	67	10					1	1				
Jasper				25	23	56	32							3			
Zif																	
Bedford															19		
Indian Prairie															31	1	1
	47	43	44	251	180	213	76	1	5	3	3	1	1	3	50	1	1

[No record of vote in 3rd district]

With this much for reply to Appellee's position we submit the case to the consideration of the Court, with the assurance, that the facts show that none can claim as being *bone fide* holder in good faith, without notice of the infirmity of the issue, and that it was a total want of power to obligate the tax payers of the County of Wayne. Purchasers of municipal obligation must look to the power to issue as well as know the official character of those that issue such obligations and know that he is such official. There is no estopple for Appellants to deny the obligation if our position is sustained by the record.

All of which is respectfully submitted,

H. TOMPKINS and
BELL & GREEN,
Attys. for Appellants.